Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Remand Proceedings	)	CC Docket No. 90-623
Bell Operating Company Safeguards	)	
and Tier 1 Local Exchange Company	)	
Safeguards	)	
	)	
	)	
Application of Open Network	)	CC Docket No. 92-256
Architecture and Nondiscrimination	)	
Safeguards to GTE Corporation	)	

REPLY COMMENTS

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SUMMARY

CPNI rules are an inappropriate tool for addressing privacy concerns. The comments in this proceeding demonstrate the current anomaly of imposing CPNI requirements on only a handful of industry participants, even as a competitive safeguard in specific markets. To suggest that these CPNI rules similarly may be applied to only a segment of the industry as a privacy safeguard ignores both the purpose of the CPNI rules and the differences between CPNI issues and privacy issues. Privacy concerns reflect a much broader public policy matter that cannot be contained or controlled by the application of CPNI rules to a limited number of participants in select markets.

Parties who advocate modification of the CPNI rules have failed to address the privacy issues identified in the Notice or to suggest why privacy concerns might support proposed modifications. Rather, they have reargued past Commission decisions on competitive equity grounds. Accordingly, these parties have contributed little, if anything, to analysis of the issues raised in the Notice.

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REPLY COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth"), hereby responds to comments submitted in response to the Commission's recent Notice[1] in the above referenced proceeding.

In the Notice, the Commission asked for comment addressing the extent to which proposed alliances in the telecommunications industry might affect the weight attributed to privacy concerns in the Commission's historical balancing of competing interests in its rules addressing customer proprietary network information ("CPNI"). Comments of parties who properly focused on privacy issues in response to this inquiry demonstrate that

[1] Public Notice, Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, CC Docket No. 90-623, CC Docket No. 92-256, FCC 94-63 (rel'd Mar. 10, 1994) ("Notice").

the CPNI rules are an inappropriate tool for protecting privacy expectations. A number of parties chose to ignore or only pay lip service to privacy concerns, however, and instead attempted to reargue past Commission decisions on CPNI. The bottom line is that no showing was made that the potential alliances to which the Notice alluded provide any privacy-based justification for modification of the Commission's current CPNI rules.

I. CPNI Rules Are an Inappropriate Tool for Addressing Broad and Ill-Defined Privacy Issues

As several commenters observed, the Commission has addressed CPNI issues on numerous occasions in the past. Each of those occasions has been in the context of rulemakings to accommodate participation by certain carriers in the CPE and enhanced service marketplaces. This history makes clear that the Commission's overriding purpose in developing the CPNI rules was to address issues of competition and competitiveness in the nonregulated markets in which the identified carriers desired to participate. The narrowness of both the purpose and application of the rules to date makes them an inappropriate tool for addressing broader privacy concerns that are not, and cannot be, limited by market definition or participant identification. If the Commission finds it necessary that privacy issues be addressed at all, it should, at a minimum, initiate a separate inquiry so that the potential benefits

or impacts of privacy-oriented rules on all industry participants can be considered comprehensively.

BellSouth agrees with those parties who assert that the Commission's rules were never designed to be used as a privacy protection mechanism. Although the Commission properly recognized customer privacy concerns as a prong in its balancing analysis of competing CPNI interests, that recognition was never expressed as an affirmative intent to advance customers' privacy interests. Rather, consideration of privacy concerns in the CPNI balance was an accommodation of reasonable customer expectations that were already being guarded by BOC practices not to disclose such information without customer authorization.

The BOCs have, and have always had, at least as much incentive as any other business to guard the confidentiality of information they maintain about their customers. Indeed, it is the obligation imposed on the BOCs (and now on GTE) to disclose this information to nonaffiliated entities in furtherance of the Commission's "competitive equity" objective that stirs the privacy pot in the first place.

While BellSouth has acknowledged the propriety of the Commission's consideration of customer privacy concerns in developing its CPNI rules, the privacy prong of the analysis is merely a recognition that the competitive equity objective must be tempered by appropriate deference to reasonable customer expectations regarding dissemination of

information to third parties with whom the customer had no apparent business relationship. Thus, the privacy prong has been used by the Commission, correctly, as a check on the Commission's overall competitive equity objective that might otherwise suggest unfettered disclosure of customer information. Consideration of privacy concerns in this context, however, provides an insufficient foundation or framework for development of a broader privacy policy, much less for development of any rules necessary for implementation of a such a policy.

Commenting parties are also correct to recognize that CPNI issues and privacy issues are not the same thing. CPNI rules are a competitive safeguard that the Commission has imposed, rightly or wrongly, to redress a perceived competitive imbalance. Privacy issues, on the other hand, are a much broader public policy matter that cannot be contained or controlled by the application of CPNI rules to a limited number of participants in select markets.

Indeed, the Notice implicitly recognizes the limited utility of the current CPNI rules for responding to privacy considerations by inquiring whether the current rules (or any newly modified rules) should apply to LECs in addition to the BOCs and GTE. As BellSouth stated in its Comments, BellSouth does not support the application of CPNI rules, existing or modified, to other LECs. The administrative burdens caused are not warranted by the benefits the rules

purportedly deliver. More important for this proceeding, however, is that because CPNI rules were designed as a competitive safeguard, application of these rules to other LECs would do no more to address privacy concerns of their customers than they do for customers of LECs already subject to the rules.

Moreover, those parties who fail to acknowledge that privacy issues extend beyond the narrow focus of the CPNI rules offer no sustainable rationale for distinguishing between privacy expectations of customers of carriers subject to such rules and customers of carriers (or other businesses) not subject to those rules. Neither does anyone suggest how privacy concerns can exist only in the context of the markets in which the CPNI rules apply.

The Commission recently expressly reaffirmed the narrow application of its CPNI rules.[2] In an order released less than three months before the Notice in the instant proceeding, the Commission stated:

> AT&T is clearly correct that, by their terms, our CPNI rules and other nonstructural safeguards developed pursuant to the Third Computer Inquiry and other proceedings are, for AT&T as well as the BOCs, exclusively applicable to the sale and provision of CPE and enhanced services.[3]

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[2] BankAmerica Corporation, et al. v. American Telephone & Telegraph Co., et al., Memorandum Opinion and Order, 8 FCC Rcd 8782 (1993) ("AT&T CPNI Order").

[3] AT&T CPNI Order, at para. 26 (emphasis added). The Commission's confirmation that its CPNI rules apply only in the CPE and enhanced service contexts renders APCC's

Moreover, the Commission went on to hold that even if the information AT&T had disclosed to its credit card affiliate did constitute CPNI, the disclosure did not violate the CPNI rules. AT&T was not required to withhold the information from its credit card affiliate under any privacy theory or to disclose the information to competing banks under any competitive equity theory.[4] Thus, the Commission has acknowledged that to the extent a privacy component is included in the CPNI rules, it is designed to guard against unexpected disclosure of customer related information to non-affiliated parties, but not to preclude "sharing of some customer network information with a non-regulated affiliate to promote goods and services which involve both regulated and non-regulated functions."[5]

The foregoing decision also serves to highlight another significant aspect of the Commission's current inquiry as it relates to existing CPNI rules. The Notice focuses on

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comments inapposite to this proceeding. In any event, BellSouth already automatically treats CPNI of independent payphone providers as "restricted" and does not permit access by BellSouth's own payphone marketing personnel.

[4] This result is entirely consistent from a "privacy interest" perspective with the policy espoused by the Commission previously in the TCPA proceeding, which both USTA and BellSouth cited in their comments in this proceeding: "[W]e find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CC Docket No. 92-90, FCC 92-443 (rel'd Oct. 16, 1992).

[5] AT&T CPNI Order, at para. 27.

privacy interests as they may be affected by current CPNI rules imposed on the BOCs and GTE, and asks whether the CPNI rules should be extended to other LECs. Curiously, of the more than thirty respondents to the Notice, IXCs are noticeably absent, including AT&T to whom CPNI rules do apply.

The clear reading of this lack of participation is an obvious recognition by the IXCs that while they might normally urge more regulatory burdens on the BOCs, any argument they might make on a privacy theory basis would apply equally to them.[6] In essence, the absence of IXCs from this proceeding for that reason is tangible evidence that "privacy issues" are not confined to BOCs, GTE, or other LECs, much less to the activities of some of them in nonregulated markets. To the extent any privacy issue

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[6] As several commenters observed, mergers and alliances in the telecommunications industry are not limited to those involving the BOCs or other LECs, the AT&T-McCaw deal being the most notable example. That such alliances raise for IXCs the same issues that have been asserted with respect to LECs was amplified in press coverage of the most recently announced IXC merger proposal between Sprint and Electronic Data Systems (EDS):

> The deal also would give each company access to the other's customer base. Sprint would relish the opportunity to win the long-distance services of EDS's blue-chip customer base, and EDS -- hoping to duplicate in the consumer market its success in corporate data processing -- would welcome access to the Sprint brand name and mass-market customer base.

Sprint and EDS Plan to Create New Giant; Like Deals May Follow, The Wall Street Journal, May 17, 1994, at 1, Col. 6.

exists that merits attention by the Commission, the issue is not defined by market characteristics of a particular carrier.

In sum, the comments in this proceeding demonstrate the current anomaly of imposing CPNI rules as a competitive safeguard on only a handful of industry participants. To assert that these CPNI rules similarly may be applied to only a segment of the industry as a privacy safeguard defies logic. If the Commission is truly interested in protecting the purported privacy interests of consumers, it should pursue consideration of those issues in a separate proceeding. The Commission should not try to redress privacy issues using tools designed for another purpose.

II. Parties Who Reargue the "Competitive Equity" Prong of the Commission's Past Decisions Have Addressed the Wrong Issue

As anticipated, existing providers of enhanced services seized the opportunity provided in the Notice for addressing the "privacy" aspect of the Commission's rules to address instead the same competitive equity argument they have advanced for years. These parties at best pay lip service to privacy issues, and then merely argue "competitive equity" and "sameness" to support their cries for rule modifications. Not only do these arguments confirm that CPNI rules are an inappropriate vehicle for consideration of privacy issues, they also provide no new justification on

non-privacy grounds for modification of the current rules. Accordingly, these parties have contributed little, if anything, to analysis of the issues raised in the Notice.

At the outset, it must be noted that those advocating rule modifications hardly mentioned the potential alliances that the Notice suggested gave rise to the need to consider the relationship between privacy interests and CPNI. This is due in some part, no doubt, to the fact that many of the previously announced proposed alliances have now been called off. Another explanation is that the projected alliances, even were they to occur, would have no significant impact on reasonable customer expectations of privacy. Whatever the reason these parties did not focus on the stated predicate for this proceeding, however, none of these parties advocating a change in the CPNI rules have based their arguments on any change in circumstance since the Commission last revisited its CPNI rules.[7]

Those who advocate change only pay lip service to the Commission's request for privacy impact analyses. Moreover, they focus on the "privacy concerns" of large customers rather than on whether there is any cognizable impact on the privacy concerns of residential and small business

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[7] While a few commenting parties did make vague references to potential alliances (real and imagined), none shows why any such alliances should have any impact on the operation of the CPNI rules. Moreover, even where references to potential alliances were made, the arguments made by these parties were grounded in "competitive equity" rather than in "privacy" as solicited by the Commission.

customers.[8]

Additionally, much of the information these parties assert the BOCs have about the "personal lives" of their subscribers does not exist. In BellSouth territory, over 91.5% of residential local service is flat rated or message rated. Thus BellSouth generally has no clue who these subscribers call or when. Even to the extent BellSouth may capture such information on measured local service or intralata toll calls, the information is no different from that available to IXCs on interlata calls. Moreover, in no case does BellSouth know the content of the communication. No legitimate reason exists to support imposition of a privacy-based rule on BellSouth, but not on IXCs who have the same customer information available to them.

Indeed, arguments advanced by ESPs in the name of privacy protection for consumers are nothing short of hypocritical. While these parties might assert that their own customers' records are "private", these parties make clear that they are not interested in protection against dissemination of other companies' customer information.

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[8] See, e.g., ITAA at 4-5. Only Cox purports to address privacy concerns directly by proposing a system based on gradations of privacy expectations. Apparently, a BOC's obligations with respect to customer information would depend on each individual customer's expectation with respect to a specific bit or type of information. The administrative costs and impracticalities of such an approach are so obvious one can only assume Cox knowingly advanced its proposal with the intent to so burden the BOCs that they would be even more hampered in their attempts to operate efficiently in competitive markets.

They are interested, as they always have been, not in privacy, but in having access to information on the same terms as the BOCs. This position is antithetical to the Commission's findings in this proceeding as well as the TCPA proceeding that customers expect the sharing of information among affiliated entities, but not among nonaffiliated entities.[9]

These parties' credibility on privacy protection issues is further undermined by the very nature of their operations. These parties' businesses are not just the transmission of information, but the generation, collection, manipulation, and dissemination of information. These parties are able to develop precise understandings of their customers' disparate interests. No doubt these parties actively engage in the creation, customization, purchase and sale of customer lists based on customer interests or other factors where it suits these parties' business interests to do so. While BellSouth does not mean to suggest that these parties engage in bad businesses or bad business practices, the fact is that these parties have no apparent real interest in privacy expectations of the BOCs' or other LECs' customers. They should not be allowed to leverage the Commission's concern for these issues into changes in competitive safeguards merely to achieve a more advantageous competitive position.

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[9] See note 4, supra.

CONCLUSION

For the reasons expressed above and in its Comments, BellSouth urges the Commission to recognize that CPNI rules, which apply only to a handful of participants in specific markets, are an inappropriate tool for addressing broad privacy concerns. The Commission should also reject the attempts by others to utilize this inquiry into the relationship between privacy issues and CPNI rules to reargue their competitive agendas. No modifications, to further restrict BOCs' use of CPNI are warranted.

Respectfully submitted,

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May 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of May, 1994, serviced all parties to this action with a copy of the foregoing REPLY COMMENTS reference to CC Docket No. 90-623, and CC Dooket No. 92-256, by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.

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